SUPREME COURT, U. S.

MAY 26 1969

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968.

No. 1326

ST. JAMES TEMPLE OF THE A. O. H. CHURCH OF GOD, INC., A RELIGIOUS CORPORATION, ET AL.,
Petitioners,

vs.

BOARD OF APPEALS OF THE CITY OF CHICAGO, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT.

RESPONDENTS' BRIEF IN OPPOSITION.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO 56

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QUESTION PRESENTED.

Whether the City of Chicago discriminates against the establishment of churches.

STATEMENT OF FACTS.

The Petition for Writ of Certiorari includes gratuitous statements which do not appear in the record and omits facts which are needed for a fair understanding of this case.

The petition recites that prior to the location of the church in its present site it was located "in an all-Negro neighborhood" (Petition, p. 3). The only reference in the record regarding the prior location of the church appeared in the petitioners' Complaint in Administrative Review filed in the Circuit Court of Cook County, Illinois, which alleged that the church was founded and located at 3028 S. Michigan Avenue, Chicago, Illinois, then moved to 3158 S. Michigan Avenue, Chicago, Illinois, and ultimately removed to its present location at 856 W. 79th Street, Chicago, Illinois (A. 3, R. 5). There was no reference to the racial character of these locations.

Also under the heading "Statement of Facts," the petition recites that the petitioners "working within the limits of its budget" sought to establish a church in the area which was "beginning to show the strains of racial transition from Caucasian to Negro". (Petition, p. 4). Again, it should be noted that the record is devoid of any reference to whether the petitioners were or were not "working within the limits of its budget" nor is there even a scintilla of evidence that "the area was beginning to show the strains of racial transition from Caucasion to Negro."

The petition also states as a fact that "strong opposition to a Negro storefront church appeared". (Petition, p. 4). Strong opposition to the storefront church was expressed by residents of the neighborhood, who for the most part were Negroes, but the opposition, both in testimony and letters to the Board of Appeals, was directed against the storefront church *per se* and not its racial make-up (A. 16-19, 24-30; R. 35-40, 63-85).

After the Circuit Court of Cook County, Illinois, on administrative review, affirmed the action of the Board of Appeals in denying a special use for the storefront church, the petitioners filed an appeal directly to the Supreme Court of Illinois (*St. James Temple, etc.* v. *The*

Board of Appeals, et al., No. 40077). On March 28, 1967, the Supreme Court of Illinois transferred the appeal to the Appellate Court of Illinois, First District. The transfer order recited, *inter alia:*

> "Although plaintiff claims that there is a question of freedom of religion presented, we find no substantial question of that nature in the record. The case involves only the usual factors present in every zoning case and we have no jurisdiction on direct appeal."

After the Appellate Court of Illinois affirmed the denial of the special use, the church petitioned for leave to appeal to the Supreme Court of Illinois and the petition was denied.

REASONS FOR DENYING THE WRIT.

For the following reasons, a writ of certiorari should not issue to review the decision of the Appellate Court of Illinois, First District.

THERE IS NO DISCRIMINATION AGAINST THE ESTABLISHMENT OF CHURCHES IN THE CITY OF CHICAGO.

Under the provisions of the Zoning Ordinance of the City of Chicago churches are permitted uses in all areas in the city zoned R1 through R8, which includes every residence district. In various other classifications, including B4-2, Restricted Service District, a church may be established if an application for a special use is filed and approved by the Zoning Board of Appeals. This zoning legislation is consistent with the modern theory of zoning. It controls intensity of use, or, expressed differently, prevents extremes in density of people throughout the urban centers. In addition, it seeks to establish a pattern of types of uses so that a factory, for example, is precluded from being established in the midst of a residential area. It prevents uses which are incompatible with the character and development of permitted uses in the area and it protects the public welfare and health by limiting congestion in the public streets. The record discloses that the petitioner church had two locations prior to the one now at issue and both were in areas zoned general residential, under which churches are permitted uses (A. 3, R. 5). The petitioners then established and operated the church at 856 W. 79th Street, Chicago, Illinois (A. 3, R. 5). This was a B4-2, Restricted Service District, where a special use permit was required.

Mr. Jim Norris testified at the hearing before the Board of Appeals of the City of Chicago that he inquired of the petitioners whether they had a permit to conduct a church at the location and was told they had a permit. He then checked and found that the church did not have a permit and therefore filed a complaint with the Building Department. The witness stated that traffic and parking was a problem on 79th Street (A. 28, R. 80-81).

Thereafter, the petitioners filed an application for a special use under the provisions of the ordinance (Chicago Zoning Ordinance, sec. 11.10-2). The Chicago Zoning Ordinance, sec. 11.10-4 establishes the required standards to be met for the issuance of a special use, as follows:

> "No special use shall be granted by the Zoning Board of Appeals unless the special use:
>
> (1) a. Is necessary for the public convenience at that location;
>
> b. Is so designed, located and proposed to be operated that the public health, safety and welfare will be protected; and
>
> (2) Will not cause substantial injury to the value of other property in the neighborhood in which it is to be located; and
>
> (3) It is within the provisions of 'Special Uses' as set forth in rectangular boxes appearing in Articles 7, 8, 9 and 10; and
>
> (4) Such special use shall conform to the applicable regulations of the district in which it is to be located."

After a hearing (A. 15-31, R. 35-87) the Board of Appeals denied the application for a special use on a finding that no facts were presented which justified approval of the application (A. 5-6, R. 8). On Administrative Review the Circuit Court of Cook County affirmed the de-

nial of the special use and found it was not against the manifest weight of the evidence heard by the board nor contrary to the requirements of the ordinances or statutes (A. 32, R. 96).

In *Audino* v. *Board of Appeals of Chicago*, 75 Ill. App. 2d 347 (1966 Abst. Op.), the court stated (slip opinion):

> "The validity of a 'special use' ordinance is well established and the burden is on plaintiff to satisfy the standards it imposes. *International Harvester Co.* v. *Zoning Board*, 43 Ill. App. 2d 440, 193 N. E. 2d 856 (1963); *Kosoglad* v. *Zoning Board of Appeals of Chicago*, 47 Ill. App. 2d 216, 198 N. E. 2d 216 (1964); *Kotrich* v. *The County of DuPage*, 19 Ill. 2d 181, 166 N. E. 2d 601 (1960)."

At the hearing, the petitioners failed to sustain the burden of establishing that they had met the standards required by the ordinance for the issuance of a special use permit. They did not show that the church at the location they chose was necessary for the public convenience. The most they established was that it suited their convenience, and even this is questionable, since nothing in the record even suggests that the members of the church lived in the area. "Their convenience" could not be equated to mean "public convenience" as expressed in the ordinance.

A succession of witnesses opposed to the granting of the special use testified, and a number of individuals and organizations sent the board letters likewise expressing opposition. For example, Hezkiah Reed, Henry Dungy, Joe Jackson and Osceola Saffold, who all lived on south Peoria Street immediately adjacent to the church, objected to the church location because it caused a traffic and parking problem and a resultant hazard to children playing in the vicinity (A. 26-28, R. 71-78).

Churches are permitted in all of the areas of the city classified for residential use, no special use or other special

permit is required to establish a church in any of these residential areas. The petitioners did not endeavor to obtain property in the large residential areas surrounding 79th Street for the establishment of their church. They merely opened a church on 79th Street and then sought to obtain the requisite permission only after the neighbors objected to their actions.

Thus, the record reveals that not only did the petitioners fail to sustain the burden of showing that the required standards were met, but, in addition, the record discloses facts that militated against the issuance of a special use. In the face of this record, the petitioners have made an unsupported calumnious accusation that "the Illinois courts have sanctioned a plan to prevent the establishment of a Negro church in a racially changing neighborhood by construing a Chicago Zoning Ordinance in an unconstitutional manner" (Petition, p. 4). The references to "a Negro church" and "a racially changing neighborhood" are entirely gratuitous observations by the petitioners; there is nothing in the record to sustain these statements.

The petitioners cite *O'Brien* v. *City of Chicago,* 347 Ill. App. 45, 105 N. E. 2d 917 (1952), in support of their contention that the government could not exercise the police power to prevent a church in a particular locale of the city (Petition, p. 5). However, they only set out a small segment of the decision, whereas the facts in the *O'Brien* case plus a more complete citation of the court's language demonstrates that, in fact, the decision is inapposite to the instant petitioners' contention.

O'Brien v. *City of Chicago, et al.,* 347 Ill. App. 45, was an appeal from a declaratory judgment which held invalid the approval by the City Council of Chicago of a plat of subdivision establishing a church on the corner of 93rd and Pleasant Avenue, Chicago. The plaintiff owned and resided on property adjoining the site and sought to prevent

construction of the church. On appeal the court held that the church could be constructed. Preceding the language cited in the instant petition, the Illinois reviewing court stated (p. 51):

> "The ordinance as we have interpreted it, imposes a condition with respect to the site on which a church may be erected. There is no question of the city's right to exercise its police power in this fashion provided the conditions are reasonably related to the public health, morals, comfort, safety or welfare. See *City of Sherman* v. *Simms*, 143 Tex. 115, 183 S. W. (2) 415; *Pentecostal Holiness Church of Montgomery* v. *Dunn*, 248 Ala. 314."

The excerpt from the *O'Brien* case recited in the instant petition states that courts will not allow prohibitions against the erection of a church *in any area*, whereas in the case at bar the ordinances of the City of Chicago provided that churches could be maintained in any residential district. Immediately following the quotation from *O'Brien* cited by the petitioners, the court continued (pp. 51-52):

> "[T]ext writers support the view which courts generally have taken. In Bassett on Zoning (1936), p. 200, the author says:
>
> > 'Practically all zoning ordinances allow churches in all residential districts. It would be unreasonable to force them into business districts where there is noise and where land values are high * * *.'
>
> "Yokely, Zoning Law & Practice (1948), sec. 183, p. 367, says:
>
> > 'Since the advent of zoning, churches have been held proper in residence districts. Both the early decisions and the recent ones frown on the exclusion of churches from residence districts * * *.'"

The Court in *O'Brien* then continued (p. 53):

> "[W]e do not believe it is a proper function of government to interfere in the name of the public to exclude

churches from residential districts for the purpose of securing to adjacent landowners the benefits of exclusive residential restrictions."

The City of Chicago follows the rule suggested in the *O'Brien* decision by specifically allowing churches in all residential areas.

The petitioners allege that the instant case is in conflict with *Columbus Park Congr. of Jehovah's Witnesses, Inc.* v. *Board of Appeals,* 25 Ill. 2d 65, 182 N. E. 2d 722 (1962). The Appellate Court of Illinois, First District, carefully distinguished that decision from the instant case (Petition, p. 6a).

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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